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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
No. 789 -- August Term 1994

Argued: February 23, 1995 Decided: June 5, 1995

Docket No. 94-7547

CARMINE CASELLA,
APPELLANTS

v.

EQUIFAX CREDIT INFORMATION SERVICES,
AND TRANS UNION CORPORATION,
APPELLEES

Before: NEWMAN, *Chief Judge*, VAN GRAAFEILAND AND COFFIN,* *Circuit Judges*.

Appeal from the May 11, 1994, judgment and July 27, 1994, order of the United States District Court for the Southern District of New York (Gerard L. Goettel, Judge) denying plaintiff's motion for partial summary judgment, granting defendant's motion for summary judgment, and dismissing a complaint seeking damages under the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.* (1988).

Affirmed.

James B. Fishman, New York, N.Y.
(Jerome Greenberg, New York, N.Y., on the brief),
for plaintiff-appellant.

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*The Honorable Frank M. Coffin of the United States Court of Appeals for the First Circuit, sitting by designation.

Kenneth A. Becker, New York, N.Y.,
(Richard R. Lutz, James M. Hershler, Townley & Updike, New York, N.Y., on the brief), for defendant-appellee Equifax Credit Information Services.

Mark E. Kogan, Marion, Satzberg, Trichon & Kogan, Philadelphia, Pa., for defendant-appellee Trans Union Corporation.

JON O. NEWMAN, *Chief Judge*:

This appeal from a grant of summary judgment in favor of two credit reporting agencies requires us to consider the types of injury that can justify a damages award under the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.* (1988) ("FCRA"). Plaintiff Carmine Casella appeals from the May 11, 1994, judgment of the District Court for the Southern District of New York (Gerald L. Goettel, J.) denying his motion for partial summary judgment, and granting the motions of defendants-appellees Equifax Credit Information Services ("Equifax") and Trans Union Corporation ("Trans Union") for summary judgment as to all claims, dismissing the complaint. Casella also appeals from the subsequent order of the District Court, dated July 27, 1994, denying his motion for partial relief from the judgment, brought pursuant to Fed. R. Civ. P. 60(b)(2). For the reasons stated below, we affirm the judgment and post-judgment ruling of the District Court.

BACKGROUND

In June 1993, Casella brought this action against Equifax and Trans Union claiming various violations of the FCRA, including 15 U.S.C. §§ 1681c, 1681i(c), and 1681g(a)(3)(A). Casella alleged, in substance, that appellees had prepared a credit report containing false and defamatory information, and that they had refused either to delete the information or to include a statement of dispute in his credit file after he notified them of the inaccuracy.

In March 1992, following the denial of his applications for credit cards at two banks, Casella obtained copies of his credit reports from Equifax and Trans Union, which contained an entry indicating that he had a past due child support obligation in the amount of $4,350 owing to the San Diego County (California) Revenue & Recovery Unit ("San Diego"). Upon receiving those reports, Casella notified appellees that he disputed the accuracy of the San Diego item and provided documentation from the New York State Family Court indicating that the support obligation had been terminated. He also requested that until the matter with San Diego was resolved, appellees include a statement of dispute in his credit report and provided each appellee with a notarized copy of such statement.

Upon receiving Casella's notification, Equifax deleted the disputed entry. As a result, it did not include appellant's statement of dispute in his credit file. One month later, however, the San Diego entry reappeared in Casella's file. Equifax attributes the reappearance to the fact that San Diego again reported the information. Equifax maintains a computerized database composed largely of accounts receivable information supplied monthly by its subscribers on magnetic computer tapes. According to Equifax, when the tapes are loaded into its database, account information is automatically included in a consumer's credit file. Thus, when San Diego continued to report that Casella had a past due obligation, that information was entered in appellant's credit file. Although appellant received updated credit reports from Equifax in July 1992 and February 1993, he did not again notify the company of the inaccurate information from San Diego.

The situation with Trans Union was different. Instead of deleting the disputed entry, as Equifax did, Trans Union investigated the dispute. When the San Diego authorities confirmed the accuracy of the entry, Trans Union informed Casella that it would continue to report the obligation. It did not, however, include a statement of dispute in appellant's file. The

District Court apparently thought that appellant had not provided Trans Union a statement of dispute. The record reflects, however, that on June 16, 1992, counsel for Casella requested that a consumer statement be added to appellant's file and sent a notarized copy of a 100-word statement to Trans Union. After receiving updated credit reports, Casella did not again notify Trans Union that he disputed the accuracy of the San Diego entry or request again that the statement of dispute be included in his file.

In the meantime, Casella sought to resolve his dispute directly with San Diego. On October 28, 1992, San Diego informed appellant that he had a zero balance and indicated that it would notify creditors. Equifax and Trans Union deny ever having received notification. In support of his motion for partial relief from the judgment pursuant to Fed. R. Civ. P. 60(b)(2), however, appellant provided copies of two Universal Data Forms, dated October 9, 1992, and February 4, 1993, purporting to transmit delete instructions to both appellees regarding the San Diego item. On November 2, 1992, San Diego wrote to appellant again, this time advising him that he still owed child support. In December 1992, San Diego reported to Equifax and Trans Union that Casella's child support obligation was past due.

The evidence was undisputed that during the period in which appellees reported the San Diego item in Casella's credit file, he did not apply for, and was never denied, any credit. Appellant contends, however, that he refrained from applying for any new credit out of fear that he would be rejected.

After Casella filed his complaint against Equifax and Trans Union, both defendants moved for summary judgment. Casella cross-moved for summary judgment on his claim that appellees had violated 15 U.S.C. § 1681i(c), by failing to include a dispute

statement in any subsequent credit report.[1] The District Court denied Casella's motion and granted appellees' motion for summary judgment as to all claims. In so ruling, it considered five issues. First, the Court examined whether appellees had violated 15 U.S.C. § 1681c, by including obsolete data in Casella's credit report.[2] It concluded that the evidence was insufficient to support that claim. Next, the Court considered whether appellees' investigations of the disputed item in Casella's report were sufficient, and ruled that as a matter of law both appellees had acted "reasonably." Turning to appellant's claim for violations of 15 U.S.C. § 1681i(c), the Court found that under the circumstances, appellees were not required to include a statement of dispute in appellant's credit file.

The Court next concluded that Casella had not satisfied his burden of showing that he had suffered any damages as a result of Equifax's or Trans Union's conduct. The District Court rejected Casella's assertions that he was injured because (a) he was discouraged from applying for mortgage loans because the San Diego item was in his credit report and (b) he suffered great emotional distress. In the Court's view, Casella had not shown that appellees, rather than San Diego, were the cause of his

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[1] Section 1681i(c) provides that:
Whenever a statement of a dispute is filed, unless there is reasonable grounds to believe that it is frivolous or irrelevant, the consumer reporting agency shall, in any subsequent consumer report containing the information in question, clearly note that it is disputed by the consumer and provide either the consumer's statement or a clear and accurate codification or summary thereof.

[2] 15 U.S.C. § 1681c provides that
(a) Except as authorized under subsection (b) of this section, no consumer reporting agency may make any consumer report containing any of the following items of information:
. . .
(6) Any . . . item of information which antedates the report by more than seven years.

injuries. Appellant had also failed to present any evidence of willful noncompliance with any provision of the FCRA, *see* 15 U.S.C. § 1681n, and thus, punitive damages were inappropriate. Finally, the Court determined that appellant had not presented evidence of either libel or wrongful communication to another credit reporting agency.

Following the District Court's decision and after he filed his notice of appeal in this Court, appellant moved in the District Court for partial relief from the judgment on the grounds of newly discovered evidence. That evidence, as noted above, consisted of two Universal Data Forms accompanied by affidavits from San Diego indicating that appellees had in fact been notified that they should delete the San Diego item. On the basis of this evidence, Casella argued that the District Court's finding that appellees had not acted willfully was erroneous. The District Judge denied Casella's motion on the grounds that (a) the evidence was cumulative, (b) even if not cumulative, it would not have changed the outcome of the case, and (c) the evidence offered could have been discovered earlier with due diligence.

On appeal, Casella raises a host of issues, but because we agree with the District Court that Casella has utterly failed to produce any evidence constituting damages under the FCRA, we need reach only that issue in affirming the judgment of the District Court.

DISCUSSION

The FCRA creates a private right of action against credit reporting agencies for the negligent, *see* 15 U.S.C. § 1681*o*, or willful, *see id.* § 1681n, violation of any duty imposed under the statute. *See Cahlin v. General Motors Acceptance Corp.*, 936 F.2d 1151, 1156 (11th Cir. 1991). For any such violation, the credit reporting agency is liable to the consumer for "actual damages" sustained, the costs of the action together with

reasonable attorney's fees and, in the case of willful noncompliance, punitive damages. *See id.* §§ 1681n, 1681*o*.

In this case, Casella bears the burden of proving actual damages sustained as a result of appellees' activities. Seeking to meet that burden, he offered in the District Court three types of damages he alleges were sustained as a result of Equifax's and Trans Union's conduct. Those damages include (1) out-of-pocket attorney's fees, (2) pain and suffering, and (3) loss of opportunity in the home mortgage market. We consider each category of damages and conclude that none of them amounts to compensable damages sufficient to withstand a motion against appellant for summary judgment.

1. *Out-of-pocket attorney's fees.* Appellant argues that he incurred out-of-pocket attorney's fees paid in the course of challenging the inclusion by appellees of the San Diego entry in his credit reports. The District Court did not rule on this aspect of appellant's damages. However, it is clear that as a matter of law, Casella would not be able to recover this element of his damages in an action under 15 U.S.C. §§ 1681n or 1681*o*.

The term "actual damages" may include out-of-pocket expenses for attorney's fees incurred by a plaintiff prior to litigation of his FCRA claims. *See, e.g., Thomas v. Trans Union Credit Information Co.*, 1992 WL 280516, at *4 (N.D. Ill. Oct. 5, 1992). The rationale behind this rule is that a consumer should not have to retain an attorney in order to force compliance with the statute. By the same token, however, prelitigation expenses to retain a lawyer should not be compensable where, as in this case, the lawyer's services were not employed to remedy any violation of the law.

The only evidence Casella presented of his prelitigation expenses is an affidavit of his attorney stating that the attorney charged, and appellant paid, $2,641.83 in connection with letters prepared and sent to Equifax and Trans Union in April 1992, and again to Trans Union in June 1992. These letters were for the purpose of

notifying appellees that Casella disputed the accuracy of the San Diego entry and to request the inclusion of statements of dispute in Casella's credit report.

Prior to being notified by a consumer, a credit reporting agency generally has no duty to reinvestigate credit information. *See, e.g.*, 15 U.S.C. § 1681i(a); *Swoager v. Credit Bureau of Greater St. Petersburg*, 608 F. Supp. 972, 975 (M.D. Fla. 1985); *see also McPhee v. Chilton Corp.*, 468 F. Supp. 494, 498 (D. Conn. 1978). Moreover, the credit reporting agency need not include a statement of dispute in a consumer's report until the consumer provides one. *See* 15 U.S.C. § 1681i(c). It is obvious, therefore, that neither Equifax nor Trans Union violated the FCRA *before* they were contacted by Casella in April and June 1992. Appellant's expenses incurred merely to notify appellees of inaccurate credit information, and not to force their compliance with any specific provision of the statute, cannot be compensable as "actual damages" for a violation of the FCRA.

2. *Pain and suffering.* Appellant next contends that he sustained actual damages in the form of pain and suffering, resulting from appellees' inclusion in his credit report of the erroneous San Diego item. In support of this claim, he offered his own affidavit, and that of his companion, Patricia Klees, explaining at length the worry, anxiety, and depression he felt while having to deal with his credit report, which stigmatized him as a "deadbeat father." That anxiety, according to appellant, was exacerbated by the fact that he had applied for a position in the Suffern, New York Volunteer Fire Department – an application, he feared, that might involve a background and credit check. Casella was ultimately accepted into the Volunteer Fire Department. Nevertheless, he argues that he suffered severe emotional distress during the pendency of his application.

In granting appellees' motion for summary judgment, the District Court properly recognized that "actual damages" may include humiliation and mental distress, even in the absence of out-

of-pocket expenses. *See Guimond v. Trans Union Credit Information Co.*, 45 F.3d 1329, 1333 (9th Cir. 1995); *Fischl v. General Motors Acceptance Corp.*, 708 F.2d 143, 151 (5th Cir. 1983); *Thompson v. San Antonio Retail Merchants Association*, 682 F.2d 509, 513 (5th Cir. 1982); *Bryant v. TRW, Inc.*, 487 F. Supp. 1234, 1240 (E.D. Mich. 1980), *aff'd*, 689 F.2d 72 (6th Cir. 1982). The Court concluded, however, that appellant was not entitled to pain and suffering damages in this case, because he had failed to show that his emotional distress was caused by Equifax and Trans Union, as opposed to San Diego. Thus, appellant's claims were apparently rejected due to a lack of causation between the harm alleged by Casella and appellees' alleged violations of the FCRA. *See Cahlin, supra*, at 1161; *Hauser v. Equifax, Inc.*, 602 F.2d 811, 816 (8th Cir. 1979). We think this was proper.

Casella presented no evidence that during the period in which Equifax and Trans Union carried the inaccurate San Diego entry, either of them provided appellant's credit report to any third party. No rational trier of fact could infer from this record that any potential creditor or other person in appellant's community learned of any harmful information from appellees. Casella's argument boils down to the bare contention that he is entitled to damages for pain and suffering simply because he *knew* of an inaccurate and potentially damaging item in his credit report. We are unaware of any case extending FCRA damages that far, *cf. Stevenson v. TRW, Inc.*, 987 F.2d 288, 297 (5th Cir. 1993) (plaintiff was denied credit three times and experienced considerable embarrassment from having to discuss his problems with business associates and creditors); *Pinner v. Schmidt*, 805 F.2d 1258, 1265 (5th Cir. 1986) (embarrassment resulting from three credit denials and from lengthy dealings with credit bureau), *cert. denied*, 483 U.S. 1022 (1987); *Thompson, supra*, at 513-14 (humiliation and embarrassment suffered from three denials of credit and fact that credit bureau took several months to correct credit report's inaccuracies); *Millstone v. O'Hanlon Reports, Inc.*, 528 F.2d 829,

834 (8th Cir. 1976) ("considerable time spent fighting O'Hanlon's grossly inaccurate reports"), and we decline to reach that result here.

In rejecting Casella's claim for pain and suffering, we note that at least one court has recently held that a cause of action exists under the FCRA even absent a denial of credit. *See Guimond*, *supra*, at 1333. Whether or not we would agree with *Guimond*, we do not believe a plaintiff can recover for pain and suffering when he has failed to show that any creditor or other person ever learned of the derogatory information from a credit reporting agency. Appellant has not met his burden of presenting evidence that Equifax or Trans Union caused his pain and suffering.

3. *Loss of opportunity*. The third type of damages appellant claims he suffered is a loss of opportunity in the home loan mortgage market. The substance of that claim is that as a result of appellees' erroneous credit reports, Casella lost the opportunity to take advantage of low mortgage interest rates and low housing prices prevailing during the period in which appellees carried the derogatory San Diego information. Appellant submitted evidence that in 1992, he and his companion were actively seeking to purchase a home, and that at various times during that year they had sufficient resources to obtain an 80 percent home mortgage in Casella's community. Casella concedes, however, that at no time during the relevant period did he actually make an offer to purchase a home, or apply for a mortgage. Instead, he claims, he refrained from making any credit applications in order not to tarnish further his credit history.

Whether or not Casella had the wherewithal to obtain a mortgage, the District Court properly found that, in the absence of any evidence that appellant made an offer to purchase property or applied for a home mortgage, the "lost opportunity" damages he alleged were too speculative. Though appellant cites cases suggesting that loss of opportunity in the mortgage market or a delay in obtaining credit resulting in less favorable terms may

constitute compensable damages under the FCRA, *see Bryant v. TRW*, 689 F.2d at 79; *Kreger v. United Credit Services, Inc.*, 1992 WL 414653 (Wis. App. Nov. 25, 1992) (unpublished disposition), we do not find those circumstances present here. *Kreger* involved an attempt by plaintiff to refinance a mortgage he already held. *See id.* at **1. Moreover, there was specific evidence in *Kreger* that a particular bank might have issued a new loan, absent plaintiff's negative credit report. *See id.* at **2. In this case, by contrast, Casella identified no bank that was interested in giving him a home mortgage. Indeed, as noted above, he presented no evidence that any potential creditor bank even received his credit report. Under the circumstances, appellant has completely failed to meet his burden of demonstrating any damages resulting from being deprived of a loan. *See Ladner v. Equifax Credit Information Services*, 828 F. Supp. 427, 432 (S.D. Miss. 1993) (plaintiff withdrew her application for a loan and never reapplied).

4. *Punitive damages*. Casella further argues that even if he is not entitled to any "actual damages," he still may be entitled to punitive damages on the theory that Equifax and Trans Union willfully violated various provisions of the FCRA. *See* 15 U.S.C. § 1681n. As appellant carefully points out, punitive damages may be available even where a plaintiff has sustained no actual damages. *See* 15 U.S.C. § 1681n(2); *Boothe v. TRW Credit Data*, 557 F. Supp. 66, 71-72 (S.D.N.Y. 1982). The District Court found that appellant had presented no evidence that either Equifax or Trans Union acted willfully in failing to delete the San Diego entry or to include appellant's statement of dispute in his consumer credit file. Thus, the Court concluded, Casella could not receive punitive damages. We agree that the record is devoid of any evidence supporting a theory of willful noncompliance.

Nor does the evidence Casella presented on his Rule 60(b) motion alter our conclusion. The newly discovered evidence consisted of two Universal Data Forms that apparently transmitted delete instructions to appellees in October 1992 and February

1993. The evidence also demonstrated, however, that San Diego re-reported the past due child support obligation to appellant in November 1992, and to appellees in December 1992. Throughout the relevant period, San Diego was sending mixed signals to Casella, Equifax, and Trans Union. This course of conduct does not support the kind of "conscious disregard" or "deliberate and purposeful" actions necessary to make out a claim for willful noncompliance under the FCRA. *See Pinner v. Schmidt*, *supra* at 1263 (vacating award of punitive damages); *Nitti v. Credit Bureau of Rochester, Inc.*, 375 N.Y.S.2d 817, 821 (Sup. Ct. 1975) (awarding punitive damages when "[t]ime and again plaintiff came to defendant's office and went over the same credit information . . . all to no purpose"); *Millstone*, *supra*, at 835 (awarding damages where defendant "trampl[ed] recklessly upon Millstone's rights").

The District Court did not abuse its discretion in rejecting appellant's Rule 60(b) motion on the ground that the evidence offered, even if "newly discovered," would not have resulted in a different outcome on summary judgment.

Affirmed.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

CARMINE CASELLA, *Plaintiffs,* v. EQUIFAX CREDIT INFORMATION SERVICES and TRANS UNION CORPORATION *Defendants.*	MEMORANDUM DECISION 93 civ 3867 (GLG)

This case is a dispute over a delinquency item in a credit history. Plaintiff Casella alleges that a false and inaccurate item was included in his history as compiled by defendant credit reporting agencies, Equifax Credit Information Services and Trans Union Corp., in violation of U.S.C.A. § 1681 of the Fair Credit Reporting Act (FCRA).

BACKGROUND

The credit history item underlying this case arose from plaintiff's six years of litigation in New York, from 1982 through 1989, of an interstate child support matter. That litigation apparently involved a lengthy divorce proceeding, a move by plaintiff's wife to California from New York with their three children, and attempts by a California agency to collect certain monies from plaintiff. He has described the litigation long, ugly and bitter. The culmination of the action was a disposition in the plaintiff's favor with access to that suit's court file limited to plaintiff and New York's Corporation Counsel.

Defendants Equifax and Trans Union are unrelated competing companies that for "monetary fees . . . regularly engage [ ] in . . . the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of

furnishing consumer reports to third parties, and which use [ ] any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports" as defined in 15 U.S.C.A. § 1681a(f) as consumer credit reporting agencies.

Very early in 1992 plaintiff applied for credit cards from the Ohio Savings Bank and the Monogram Bank. On or about March 3, 1992, plaintiff's application was rejected by Monogram which stated that plaintiff had made "too many recent requests for credit," and cited Trans Union for its information. On or about March 11, 1992, Ohio Savings also rejected his application stating: "housing type does not indicate stability, derogatory records present and delinquent credit obligations." Ohio Savings Bank used Equifax as its source of information. In response to plaintiff's requests, Trans Union and Equifax sent his credit reports to him.

The Trans Union report indicated that an account with "San Diego Co." was placed for collection. The Equifax report stated that "Sandiegoco" held a collection account for "child\family support obligation" (This was apparently represented monies that San Diego County expended on plaintiff's family while the support proceedings were before the court in New York.) In each report that account was the sole derogatory item. Plaintiff attests that he was very upset by the delinquency item and wondered at the time if San Diego was "trying some rogue action to get the money New York State Family Court told them to forget about collecting."

At the beginning of April 1992, plaintiff retained counsel and sent letters disputing the San Diego item to defendants. Together with those letters, plaintiff attached copies of 1988 New York Family Court Orders in the matter of "DSS of San Diego o/b/o Marie Casella vs Carmine Casella" which indicated that San Diego's claim was extinguished and a one page affidavit challenging the truth of the "Sandiegoco" entry.

In response, Equifax deleted the disputed item from plaintiff's credit file and sent copies of the revised file to him on or about June 12, 1992. Trans Union, in response to its letter,

reinvestigated the item. San Diego County confirmed the accuracy of the derogatory entry and its confirmation was relayed to plaintiff by a letter from Trans Union. The letter also informed plaintiff that he could include in his file a 100 word statement disputing his delinquency entry. There is no indication that plaintiff sent such a statement.

During this time, plaintiff had been waiting for word on his application for membership in the volunteer fire department of his town. He had applied at the beginning of March and was accepted to the squad at the beginning of June 1992.

Also at the beginning of June 1992, plaintiff contacted the San Diego Family Support division and was told that his case was still open. Plaintiff, after overcoming some difficulties due to access restrictions to the New York court records, obtained certified copies of his litigation orders and sent them to San Diego.

About July 23, 1992, plaintiff received updated copies of his Trans Union and Equifax credit files. Trans Union's report still contained the San Diego item and, to plaintiff's surprise, so did Equifax.

Meanwhile, plaintiff continued his efforts to correct the item at its source, San Diego. Finally, in October 1992, the San Diego agency, now named the Revenue and Recovery Department, agreed to update its records to show the delinquency item's withdrawal and to notify the reporting agencies of the change. However, there is no evidence that the agency or plaintiff notified the defendants of the agency's actions.

In February 1993, plaintiff requested copies of his credit reports from defendants and, when he found the San Diego County item still in them, filed the present action in June 1993.

ISSUES

Plaintiff alleges defendants violated the FCRA when they: 1) included and disseminated a false and defamatory credit item in plaintiff's credit report, 2) failed to delete said item after they were

given proof of its inaccuracy, 3) refused to disclose what prospective employers had been sent in plaintiff's credit report, 4) refused to include in plaintiffs credit report his statement disputing the item, and 5) caused TRW Credit Reporting Services to list the item. Plaintiff also makes a state claim of libel and defamation. He seeks compensatory and punitive damages. Plaintiff further asserts that the disputed item was improperly included because it was obsolete.

Defendants contend that the item, even if it were unjustified, was nevertheless accurately included in Casella;s history as reported to Defendants by the San Diego governmental agency. They further contend that, once they were informed of the item's disputed truth, it was treated reasonably and correctly.

Plaintiff now moves for partial summary judgement, arguing that defendants violated section 1681i(c) by not including in plaintiff's credit report his statement disputing the item.

Defendants have also moved for summary judgement. They assert that plaintiff, because he did not apply for any credit and thus was not denied any credit, cannot demonstrate that he suffered any damage attributable to their inclusion of the incorrect item. Hence, they argue, any assertion by plaintiff is purely speculative. Furthermore, they argue that libel requires a communication of falsehood which did not occur here.

DISCUSSION

This cases requires the examination of five issues 1) inclusion of obsolete data in violation of Section 1681c, 2) sufficiency of defendant's investigations, 3) inclusion of plaintiff's dispute of statement, 4) damages, and 5) libel.

Inclusion of Obsolete Data

Section 1681c in relevant part states: "no consumer reporting agency may make any consumer report containing any of the following items of information: . . . (4) Accounts placed for collection . . . which antedate the report by more than seven years

. . . (6) Any other adverse item of information which antedates the report by more than seven years."

The San Diego delinquency was reported to defendants as arising from a "data opened" of 01/87, five years before its inclusion in plaintiff's credit report. Although New York Family Court stated that "the order was terminated effective Jan. 31, 1983," such statement was made in its order of April 29, 1988. Hence, San Diego's claim dated from the beginning of 1987 and the claim was not actually extinguished until 1988. Measuring from either date, the requisite seven years had not elapsed at the time plaintiff began this action to mandate statutory obsolescence.

Sufficiency of Defendant's Investigations

Plaintiff asserts that defendants were negligent in their procedures to assure accuracy of credit items and did not reinvestigate disputed items sufficiently.

Defendants argue that the delinquency claim as entered was accurate before plaintiff challenged its validity. They argue that their procedures are reasonable.

Before defendants were initially informed by plaintiff, they could not have found information to counter the derogatory item in their process of verifying adverse material received, particularly in light of the sealing of the New York court records. Considering the source of the information, a government agency, defendants had no reason to doubt the source's veracity. In a similar case *McPhee v. Chilton Corp.*, 486 F.Supp 494 (D.Conn. 1978), the court held that a credit reporting agency did not violate FCRA when the agency noted in the consumer's credit report only his filing of a petition of bankruptcy without adding any information about the filing's outcome. Mr. McPhee's bankruptcy petition was made and then withdrawn shortly afterwards. A mortgage application by Mr. McPhee that was denied alerted him that follow up information about the petition was missing from his credit report.

The court in *McPhee* held that:

> By including such information, the report might have been "more accurate than it was" [in that it] might have noted that the petition had been withdrawn, or in different circumstances that a full adjudication of bankruptcy had occurred. But unless that information was available at the time the agency first learned that a petition for bankruptcy had been filed . . . so that the agency could find the information in the reasonable process of verifying adverse material as received, the agency could not be charged . . . for the omission of later developments.

Id. at 498 (citations omitted).

Similarly, in this case information about plaintiff's successful litigation of the San Diego claim in New York was unavailable to defendants at the time the agencies first learned of the debt liquidation. From all that appears, even San Diego County was unaware of the sealed New York court order. Hence, defendants' inclusion of the San Diego claim before plaintiff's notification to them was unobjectable under the FCRA.

After notification, Equifax asserts that they immediately deleted the item and only reentered it when San Diego again reported the claim. They contend that, had plaintiff reasserted his dispute, the item would have been removed again.

The record shows that Equifax did promptly delete the disputed delinquency upon petition by plaintiff. Later, when San Diego County again reported the delinquency, Equifax reentered it in plaintiff's credit file. In light of Equifax's unquestioning deletion of the delinquency item the first time plaintiff complained, essentially taking plaintiff's position without investigation, there is no reason to doubt that they either would have similarly deleted the item if the plaintiff had complained a second time or investigated at such time. However, plaintiff never made such a second complaint to Equifax. He chose to break off communications with Equifax, apparently to deal with the problem at its source: San

Diego County. Therefore, under these circumstances, Equifax investigated reasonably and sufficiently.

Trans Union took a different tack, choosing to ask the San Diego agency directly to verify the electronic data transmission. It received a confirmation of the delinquency's validity. Trans Union then notified plaintiff of San Diego's position and gave him an opportunity to insert a statutorily mandated 100 word statement in his report to counter the derogatory claim.

We find that Trans Union's procedure is reasonable and sufficient to assure accuracy. When the delinquency item was disputed, Trans Union verified it through a different confirmatory source (inquiry to a person at the state agency itself) from the original transmission source (mass electronic data). Upon confirmation, Trans Union notified the consumer, informed him of the claim's origin, and gave him the opportunity to insert a countervailing argument into his credit report.

Trans Union's investigation procedure would either determine the validity of the claim or set out the two sides of the claim's dispute under ordinary circumstances where the transaction or record in dispute was between the consumer and the creditor directly. The disputed delinquency claim in this case, however, presented defendants with an extraordinary situation where the consumer was asserting that a third party had absolved the claim. Plaintiff was asserting that San Diego's claim had been extinguished by a New York court.

The defendants were faced with contradictory assertions that could not be reasonably resolved from their exchange of correspondence with plaintiff, since in each case plaintiff cut short the correspondence. Plaintiff argues that both defendants should have asked the New York court directly to resolve the dispute.

However, defendants had no duty to investigate and resolve what in essence is a legal or bureaucratic dispute underlying a creditor claim. In this case, we cannot expect defendants to have declared San Diego's claim invalid. Expecting credit reporting

agencies to independently police the validity of state claims would burden commercial dealings beyond any currently required legislative mandate.

A further consideration is that, although defendants did report information that ultimately had no legal basis, the information was accurate at the time of reporting. At that time the San Diego County Family Support Division's position was that plaintiff was delinquent. Its overruled but uncontested claim caused more than just the derogatory credit item on plaintiff's credit reports: the Internal Revenue Service seized plaintiff's 1991 tax refund for application to San Diego County's claim. Defendants were not informed, either by plaintiff or San Diego, of the County's withdrawal in October 1992 of the delinquency item. Without notification, defendants reasonably considered the dispute resolved some five months earlier when San Diego had confirmed plaintiff's delinquency.

Inclusion of Defendant's Statement

Section 1681i states in relevant part:

> (b) If the reinvestigation does not resolve the dispute, the consumer may file a brief statement setting forth the nature of the dispute. The consumer reporting agency may limit such statements to not more than one hundred words if it provides the consumer with assistance in writing a clear summary of the dispute.
>
> (c) Whenever a statement of a dispute is filed, unless there is reasonable grounds to believe that it is frivolous or irrelevant, the consumer reporting agency shall, in any subsequent consumer report containing the information in question, clearly note that it is disputed by the consumer and provide either the consumer's statement or a clear and accurate codification or summary thereof.

Equifax considered the dispute resolved by San Diego's retransmission of plaintiff's delinquency and hence outside the

requirement of the section. Upon plaintiff's challenge of the delinquency item, Equifax deleted it without consideration of San Diego's position. Then, when San Diego reported it again, Equifax reentered the item on plaintiff's credit file. Plaintiff never challenged the item's reappearance. Without such challenge, Equifax could not reasonably be expected to know of the ongoing dispute between plaintiff and San Diego. Hence, Equifax could not have been expected that the inclusion in his credit report of a statement from plaintiff was necessary.

Trans Union knew of plaintiff's dispute but considered its offer to include a 100 word statement an adequate interpretation of the statutory requirements of Section 1681i. Plaintiff did not respond with such a statement, arguing instead that Trans Union should have included the one page affidavit he previously sent. But the affidavit was not "a brief statement setting forth the nature of the dispute" as mandated by the statue.

Plaintiff in this case had assistance of counsel from the beginning. Hence, plaintiff was not ignorant of the meaning of the statue or his rights under it. He chose not to pursue his rights. Instead, plaintiff ceased correspondence with Trans Union and turned his efforts towards correcting San Diego's position. Under these circumstances, Trans Union did not violate the stature by not including in his credit report plaintiff's lengthier affidavits as substitutes for the statutory 100 word statement.

Damages

The court in *Morris v. Credit Bureau of Cincinnati*, 563 F. Supp. 962 (S.D. Ohio, 1983), succinctly stated the four elements plaintiff must meet in order to recover under 15 U.S.C. § 1681:

1. Defendant was negligent in that it failed to follow reasonable procedure to assure maximum possible accuracy of information about the plaintiff;
2. Defendant reported inaccurate information about the plaintiff:

3. Plaintiff was injured; and

4. Defendant's negligence was the proximate cause of such jury.

Id. at 967, (citations omitted).

Defendants argue that as to the third element, plaintiff has not given any evidence of injury and thus, they argue, summary judgement is appropriate for all claims.

Defendants argue that plaintiff was never denied credit because of the disputed delinquency item. Although two applications for credit cards were denied, one denial indicated that the derogatory item was only one of two reasons for rejecting plaintiff. The other denial was for another reason entirely. The record indicates plaintiff possessed approximately ten other credit cards, and thus their is an issue of whether denial of another credit card has injured him. Plaintiff has not presented evidence that the denial of the Ohio Savings or Monogram Bank credit cards caused him any injury. Indeed, the record shows that defendant received increased credit limits on several of his other credit cards during the period of this case. Moreover, the two denials *preceded* plaintiff's initial notification to defendants. Since defendants were not even arguably negligent *before* they received plaintiff's initial notice, the denials of credit cannot be blamed on defendants.

Plaintiff primarily asserts that he was discouraged from applying for mortgage loans because of the presence of the delinquency item in his credit reports. Although he gives evidence that he was considering the possibility of seeking a mortgage by his having attended informal seminars, at no time did he make an offer to purchase property or an application for a mortgage. Defendants argue persuasively that it is too speculative to consider what would have been the result had he applied. They argue further that the question is even more speculative whether any mortgage application rejection would have been proximately caused by the disputed delinquency if he had applied. Hence, plaintiff cannot

show that any out-of-pocked losses were caused by the inclusion of the disputed delinquency item.

Actual damages also include humiliation or mental distress, even it the consumer suffered no out-of-pocket losses. *Fischl v. General Motors Acceptance Corp.*, 798 F.2d 143, 151 (5th Cir. 1983).

The affidavits of plaintiff and his companion show that Mr. Casella suffered great emotional distress from the original Family Court litigation, becoming depressed and moody. Although he understandably was very upset by the appearance in his credit report of an item he thought had been banished to his past, the record shows that he was angry at San Diego for continuing to assert its claim, not at the credit agencies reporting the item.

Plaintiff argues that he was caused pain and suffering by the delinquency item on his credit reports. In his affidavit, he "wonder[ed] if San Diego was trying some rogue action." Plaintiff claims that his "nerves were shot, [his] attitude was surly, [his] outlook was bleak" when he was getting certified copies of his court files to send to San Diego, having realized the solution was to "try to get San Diego to correct its records." When he found that the item was on his credit reports, Mr Casella "could feel the blood pounding in [his] head," (Casella aff. ¶ 19), and he "yell[ed] that San Diego had made an entry in his credit report that he owed . . . back child support," (Klees aff. ¶ 17). While we understand his plight, these incidents only demonstrate the agony that San Diego, not the defendants, caused Mr. Casella. (He has not sued San Diego County but his attorney says that he is considering it.)

Plaintiff also asserts that he agonized over whether the volunteer company, in its investigation into his background, would find out about the disputed delinquency on his credit file. He worried about the humiliation he might suffer if they found out. Defendants point out there is no evidence that the company requested his credit history from defendants nor is there evidence that the fire company knew of the dispute. Moreover, plaintiff

was accepted into the volunteer company without any incident. Furthermore, although Mr. Casella worried about the fire department's background check and was afraid a credit check would be part of the investigation, he also "worried that there might be an outstanding arrest warrant out for him . . . and that he'd be arrested on the job or the street." (Klees aff. ¶ 20). He does not claim that this fear arises out of the San Diego dispute. Hence, he claims he suffered from the natural worries of a candidate for a sought after position. The credit delinquency item was but a part of his discomfort and we are not persuaded that it added such mental distress as to represent a cause of action.

Punitive damages, actual damages, and reasonable attorney's fees may be awarded according to Section 1681n when the reporting agency has willfully failed to comply with any of FCRA's requirements. "To be found in willful noncompliance, a defendant must have knowingly and intentionally committed an act in conscious disregard for the rights of others. Although malice or evil motive is not necessary to satisfy § 1681n, there must have been a willful violation." *Stevenson v. TRW Inc.*, 987 F,2d 288, 293-294 (5th Cir. 1993) (citations omitted). A careful review of the facts reveals a total absence of an intent or purpose by defendants to do harm to plaintiff. Hence, without evidence to support willful noncompliance, punitive damages are inappropriate.

Libel

Plaintiff has presented no evidence that his credit reports were disclosed to any individual after he disputed the San Diego delinquency. Nor has he presented any authority to support his assertion that the entry of a state agency claim of delinquent child support payments is libelous *per se*. Furthermore, the San Diego entry accurately reflected the claim then outstanding. As previously noted, independent of defendants, even the IRS held the claim to be true. Hence, the plaintiff has not demonstrated libel.

Communication to TRW

There is no indication that TRW, a consumer credit reporting agency unrelated to either defendant, was informed of San Diego's claim by defendants.

CONCLUSION

For the reasons stated above, plaintiff's motion for partial summary judgement is denied and defendant's motion for summary judgement is granted. The clerk shall enter judgement for defendants on all claims.

SO ORDERED,

Dated: White Plains, NY
May 9, 1994

GERARD L. GOETTEL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CARMINE CASELLA, Plaintiff, -against- EQUIFAX CREDIT INFORMATION SERVICES and TRANS UNION CORPORATION, Defendants.	MEMORANDUM DECISION 93-Civ 3867 (GLG)

Plaintiff Carmine Casella has filed a motion for relief from judgment pursuant to Fed.R.Civ.P. 60(b), following our grant of summary judgment to both defendants. Plaintiff claims to have discovered new evidence that requires reinstatement of his claim that defendants willfully failed to comply with the provisions of the Fair Credit Reporting Act, 15 U.S.C. § 1681 (the "FCRA").

Federal Rule of Civil Procedure 60(b) provides that "[o]n motion and upon such terms as are just, the court may relieve a party ... from a final judgment ... for the following reasons: ... (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)." Rule 59(b) provides for a ten day time limit for motions for a new trial. In order for newly discovered evidence to result in relief from judgment, the evidence must not be merely cumulative, must be material to the issues, and must be such that rehearing would probably produce a different result. *See Gemveto Jewelry Co. v. Jeff Cooper, Inc.*, 613 F.Supp. 1052, 1058 (S.D.N.Y. 1985), *vacated on other grounds*, 800 F.2d 256 (Fed. Cir. 1986).

In a memorandum decision dated May 9, 1994, we granted summary judgment to both defendants, finding as a matter of law that defendants had complied with the requirements of the FCRA, and that plaintiff had suffered no actionable damages. The source

of plaintiff's complaint was that the defendants were including in their credit reports a claim by San Diego County that plaintiff was delinquent in making child support payments, even though a New York court had cleared plaintiff of this obligation. Plaintiff sent copies of the New York court papers to both defendants, in an effort to persuade them to remove the delinquent credit item. Both defendants eventually retained the item, because San Diego County continued to report that plaintiff was delinquent. We wrote that "defendants had no duty to investigate and resolve what is in essence a legal or bureaucratic dispute underlying a creditor claim." *Casella v. Equifax Credit Info. Servs.*, No. 93 Civ. 3867 (GLG), Slip Op. at 9 (S.D.N.Y. May 9, 1994).

Plaintiff's instant motion focuses on whether defendants willfully failed to comply with their duty to use reasonable procedures to investigate disputed credit items. The evidence accompanying the summary judgment motions included a letter from San Diego County dated October 28, 1992, stating that the derogatory credit information on plaintiff was in error, and that the County was so notifying credit bureaus. Defendants denied receiving any such notification from San Diego County, and pointed out that the County had reaffirmed plaintiff's alleged delinquency in December, 1992.

Plaintiff's newly discovered evidence is the actual "Universal Data Form" used by the County to delete the derogatory credit information on plaintiff it had previously reported, along with an affidavit from a County employee stating that the form was mailed to defendants on October 14, 1992. Plaintiff also submits a similar form dated February 4, 1993, which similarly seeks to delete the derogatory information on plaintiff. There is no affidavit indicating when, or if, this latter form was mailed to defendants.

This new evidence is merely cumulative, and would probably not result in a different result if we were to reconsider the parties' motions for summary judgment. As to the October data form, plaintiff does not dispute the evidence that in December, 1992, the

County reaffirmed plaintiff's alleged delinquency. Thus, this is still a situation where credit reporting agencies were caught between a state agency reporting derogatory credit information, and a consumer who argued that a different state entity had cleared him of any delinquency. And as to the February data form, first, there is no evidence that it was mailed, and second, it is unclear whether it would have been received by defendants in time to alter their February credit reports, which are the basis of plaintiff's claims against them. This new evidence offers no reason to alter our previous conclusion that defendants acted reasonably.

Moreover, it is hard to believe that plaintiff could not with due diligence have uncovered this evidence either in time to present it in opposition to defendants' motions for summary judgment, or in time to make a motion under Rule 59(b). Well before motions for summary judgment were filed, plaintiff had received San Diego County's letter claiming to be in the process of notifying defendants that it was deleting the alleged delinquency. Plaintiff also knew that defendants denied receiving any such notification from the County. A duly diligent attorney in such a situation would have attempted to acquire from the County the letter or form by which it had sent notification to the defendants.

Defendant Trans Union Corporation asks us to sanction plaintiff and his counsel by awarding it attorney's fees. We decline this invitation. Plaintiff notes that in our earlier memorandum decision, we twice stated that there was no evidence that defendants were informed of the County's withdrawal in October 1992 of the delinquency item. Accordingly, it was not unreasonable for plaintiff to believe that if we were presented with solid evidence to the contrary, we might reach a different conclusion.

Plaintiff's motion is denied.

SO ORDERED.

Date: White Plains, New York.
July 27, 1994.

GERALD L. GOETTEL
U.S.D.J.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

GEORGE LANGE III
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 18th day of September one thousand nine hundred and ninety-five.

Casella,

Appellant,

v. Dkt No: 94-7547

Equifax Credit Infor,

Appellee.

A petition for rehearing containing a suggestion that the action be *reheard* in banc having been filed herein by the appellant Carmine Casella.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

GEORGE LANGE III, Clerk
By: Beth J. Meador,
Administrative Attorney